

E-FILED on 7/25/05

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

HVAC SALES, INC., ADVANCED  
MICROTHERM, INC. AND JOHN  
KARAMANOS,

Plaintiffs,

v.

ZURICH AMERICAN INSURANCE GROUP,  
MARYLAND CASUALTY COMPANY,  
ZURICH AMERICAN INSURANCE  
COMPANY, LAWSON-HAWKS  
INSURANCE ASSOCIATION, CRAIG  
PAPPAS, AND DOES 1 through 50, inclusive,

Defendants.

No. C-04-03615 RMW

ORDER GRANTING MOTION TO REMAND  
CASE TO STATE COURT, DENYING  
MOTION TO SEVER, AND DENYING  
MOTION FOR ATTORNEY'S FEES

[Re Docket Nos. 21, 23, 24, 29]

JOHN KARAMANOS,

Cross-Complainant,

v.

AMCO INSURANCE COMPANY,  
AMERICAN ECONOMY INSURANCE  
COMPANY, and DOES 51 through 100,  
inclusive,

Counterdefendants.

ORDER GRANTING MOTION TO REMAND CASE TO STATE COURT, DENYING MOTION TO SEVER, AND DENYING  
MOTION FOR ATTORNEY'S FEES—C-04-03615 RMW  
DOH

HVAC Sales, Inc. ("HVAC"), Advanced Microtherm, Inc. ("AMT"), and John Karamanos ("Karamanos") (collectively "plaintiffs") seek to remand a lawsuit and obtain attorney's fees. Defendants Zurich American Insurance Group and Zurich American Insurance Company ("Zurich"), Maryland Casualty Company ("Maryland"), Lawson-Hawks Insurance Association ("Lawson-Hawks"), and Craig Pappas ("Pappas") (collectively "Zurich and Maryland") also move to remand.<sup>1</sup> Cross-defendants AMCO Insurance Company ("AMCO") and American Economy Insurance Company ("SAFECO") seek to sever one cross-claim and then remand the rest of the lawsuit. The court has read the moving and responding papers and considered the arguments of counsel. For the reasons set forth below, the court (1) grants plaintiffs' and Zurich and Maryland's motion to remand, (2) denies AMCO and SAFECO's motions to sever, and (3) denies plaintiffs' motion for attorney's fees.

### I. BACKGROUND

In April 2002 AMT and HVAC brought a lawsuit in the Superior Court for the County of San Francisco alleging that various defendants engaged in illegal conduct related to public works projects ("the underlying public works case").<sup>2</sup> Three defendants—Price Industries, Inc. ("Price"), Norman Wright Mechanical Equipment Company ("NSW"), and Ove Arup and Partners California Limited ("Ove Arup")—then cross-complained against plaintiffs for defamation ("the defamation case").<sup>3</sup> Borovsky Decl. Supp. Mot. Sev. ("Borovsky Decl.") Exs. C-E. Plaintiffs tendered the cross-complaints to Zurich and Maryland. Pappas, who had initially obtained plaintiffs' insurance policies on behalf of Lawson-Hawks, received the tenders. Plaintiffs allege that Pappas incorrectly informed them that he had immediately forwarded the Price and NSW cross-complaints to the carriers. Plaintiffs claim that it was not until August 2003 that they finally received two reservation of rights letters from Zurich. The letters purportedly

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<sup>1</sup> Zurich and Maryland style their motion as one to "remand and dismiss." Zurich and Maryland apparently believe that the court must dismiss the action after remanding it. Yet the court could not do so: after remanding the case, the court would have nothing to dismiss. *See, e.g., Seedman v. U.S. Dist. Court for Cent. D. of Cal.*, 837 F.2d 413, 414 (9th Cir. 1988) ("[o]nce a district court certifies a remand order to state court it is divested of jurisdiction and can take no further action on the case"); *Mirto v. Amerian Intern. Group, Inc.*, 2005 WL 827093, \*3 (N.D. Cal. 2005) (distinguishing between remand and dismissal).

<sup>2</sup> The case has since been removed to federal court.

<sup>3</sup> Price did not name AMT as a cross-defendant.

1 admitted that the defamation and abuse of process causes of action in the defamation case implicated  
2 insurance defense coverage as to HVAC and Karamanos but denied that AMT was covered by the policy.  
3 Plaintiffs thus sued Zurich, Maryland, Pappas, and Lawson-Hawks in Superior Court for the County of  
4 Santa Clara for, *inter alia*, breach of contract, bad faith, and failure to pay for independent counsel ("the  
5 bad faith case").

6 In July 2003 Zurich, Maryland, Pappas, and Lawson-Hawks cross-complained against HVAC,  
7 AMT, Karamanos, NSW, and Ove Arup for declaratory relief and reimbursement ("the Zurich and  
8 Maryland cross-complaint"). Borovsky Decl. Ex. F. The Zurich and Maryland cross-complaint seeks  
9 reimbursement for all defense expenses paid in excess of which it is found to owe plaintiffs in the bad faith  
10 case.

11 On July 8, 2004 Karamanos filed a cross-complaint against AMCO and SAFECO ("the  
12 Karamanos cross-complaint"). Borovsky Decl. Ex. G. Karamanos alleges that AMCO and SAFECO  
13 have a duty to defend or indemnify him based on insurance policies carried by his previous employer,  
14 Microtherm Systems, Inc. ("MSI"). Karamanos claims that he tendered notice of the NSW cross-  
15 complaint to AMCO and SAFECO in September 2003 and that both carriers refused to defend or  
16 indemnify him. Karamanos seeks indemnity from AMCO and SAFECO in the event that the Zurich and  
17 Maryland cross-complaint succeeds.

18 On August 26, 2004 AMCO and SAFECO attempted to remove the Karamanos cross-complaint  
19 to federal court. However, the Superior Court removed the entire state court action, including the  
20 Karamanos cross-complaint, the Zurich and Maryland cross-complaint, and the bad faith case ("the entire  
21 dispute"). Plaintiffs move this court to (1) remand the entire dispute and (2) award them attorney's fees  
22 incurred while litigating remand issues. Likewise, Maryland and Zurich move to dismiss the entire dispute  
23 and remand it to state court. SAFECO and AMCO move to (1) sever the Karamanos cross-complaint  
24 and keep it in federal court and (2) remand the bad faith case and the Zurich and Maryland cross-complaint  
25 to state court.

## II. ANALYSIS

### A. Legal Standard

28 U.S.C. § 1441(a) entitles "defendants" to remove cases to federal court:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

However, 28 U.S.C. § 1447(c) provides that, after removal, "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."<sup>4</sup> Of course, there are two means by which a litigant can invoke federal subject matter jurisdiction. The first is federal question jurisdiction. *See* 28 U.S.C. § 1331 ("[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"). It is undisputed that this case does not involve an issue of federal substantive law. The second is diversity jurisdiction. *See* 28 U.S.C. § 1332 ("[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000 . . . and is between . . . citizens of different States"). It is also undisputed that (1) the bad faith case does not qualify for diversity jurisdiction,<sup>5</sup> (2) the entire dispute does not qualify for diversity jurisdiction,<sup>6</sup> but (3) the Karamanos cross-complaint, standing alone, would qualify for diversity jurisdiction.<sup>7</sup>

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<sup>4</sup> "The 'strong presumption' against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

<sup>5</sup> Of course, "[f]or a case to qualify for federal jurisdiction under 28 U.S.C. § 1332(a), there must be complete diversity of citizenship between the parties opposed in interest." *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1181 (9th Cir. 2004) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806)). The bad faith claim does not enjoy complete diversity because Karamanos, HVAC, AMT, Pappas, and Lawson-Hawks are all California residents.

<sup>6</sup> As noted in footnote 4, the case involves California residents on both sides and thus lacks complete diversity.

<sup>7</sup> AMCO is an Iowa corporation with its principal place of business in Iowa, SAFECO is an Indiana corporation with its principal place of business in Washington, Karamanos is a California resident, and the amount in controversy allegedly exceeds \$75,000.

**B. Motions to Remand and Sever**

Plaintiffs and Zurich and Maryland move to remand the entire dispute to state court on the grounds that (1) cross-defendants such as AMCO and SAFECO cannot remove a case to federal court and (2) the lack of diversity in either the bad faith case or the entire dispute deprives this court of subject matter jurisdiction. AMCO and SAFECO argue that this court should sever the Karamanos cross-complaint from the bad faith case and the Zurich and Maryland cross-complaint under Federal Rule of Civil Procedure 21. That provision states that "[m]isjoinder of parties is not ground for dismissal of an action" and empowers district courts (1) to drop or add parties "on such terms as are just" and (2) to sever "[a]ny claim against a party." Fed. R. Civ. P. 21.

**1. Whether Removal Was Proper**

The Ninth Circuit has declined to rule on "the interesting question whether third-party defendants are defendants for purposes of the removal statute." *O'Halloran v. University of Washington*, 856 F.2d 1375, 1381 (9th Cir. 1988). However, "the majority view is that the determination of who is a defendant is determined by the original complaint, not subsequent third or fourth-party complaints." *Schmidt v. Association of Apartment Owners of Marco Polo Condominium*, 780 F.Supp. 699, 702 (D. Haw. 1991). *Schmidt* reasoned that Congress could easily have chosen to include third-party defendants in section 1441, but did not:

We believe that the reference in the general removal statute, [section] 1441, is only to [the] plaintiff's defendants and does not include such defendants as third-party defendants, cross-claim defendants, and other parties that are not defending a claim asserted against them by the plaintiff. . . . If the plaintiff and the plaintiff's defendants must, or have chosen to, adjudicate their suit in a state forum, we fail to find any statutory right clearly given to other type defendants, by the general removal [statute], to choose a federal forum.

*Id.* (quoting 1A Moore's Federal Practice ¶¶ 0.157[7] (1989)) (alterations supplied by *Schmidt*). Numerous courts in the Northern District have agreed with *Schmidt*. See, e.g., *Ciolino v. Ryan*, 2003 WL 21556959 \*3 (N.D. Cal. 2003) ("[a]s there is no reason to diverge from this well-established approach, the [c]ourt finds that . . . a third-party defendan[t] cannot remove this case under section 1441(a)); *Gartec v. Joseph Enterprises, Inc.*, 2002 U.S. Dist. LEXIS 21110, \*3 (N.D. Cal. 2002) ("a third party defendant . . . lacks the power of removal"); *Saeilo Machinery (USA), Inc. v. Hirdes Freight, Ltd.*, 2000 WL 1205338, \*2 (C.D. Cal. 2000) ("the court adopts the majority view that cross-defendants

are not allowed to remove a case"); *Cross v. Kaiser Foundation Hospitals*, 1998 WL 737998 \*1 (N.D. Cal. 1998) ("cross-defendants and third-party defendants are not allowed to remove"); *Orosco v. Royal Roofing Co., Inc.*, 1997 WL 724456 \*1 (N.D. Cal. 1997) (finding third-party defendant's "petition for removal pursuant to section 1441(a) . . . improper").

AMCO and SAFECO argue that *Motor Vehicle Cas. Co. v. Russian River County Sanitation Dist.*, 538 F. Supp. 488, 491 (C.D. Cal. 1981), holds otherwise. *Motor Vehicle Casualty* held that "the right of removal under 28 U.S.C. [section] 1441(c) should not depend on the procedural accident that a defendant was brought in as a third-party under a particular state's procedural law." *Id.* at 491. Central to the court's conclusion was its perception that "[t]he reasons advanced in favor of restricting a defendant from removing are based more on an unarticulated bias against the 'expansion' of removal jurisdiction than they are grounded in logic and commonsense." *Id.* at 492. In 1990, Congress explicitly articulated this "bias," limiting removal under section 1441(c) to "separate and independent" claims that invoked federal question jurisdiction. *See* Pub. L. 101-650, § 312.<sup>8</sup> Because Congress overruled one of *Motor Vehicle Casualty*'s key premises, the case has dubious precedential value. Indeed, other Northern District courts have disagreed with it. *See Ciolino*, 2003 WL 21556959 \*4 ("the abstract position for which *Motor Vehicle Casualty* arguably stands has largely been abandoned"); *Saeilo*, 2000 WL 1205338 \*3 (citing

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<sup>8</sup> At the time *Motor Vehicle Casualty* was decided, section 1441(c) permitted defendants to remove "separate and independent" claims on the grounds of both federal question and diversity jurisdiction:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

*Id.* at 492 n.12. However, in 1990, Congress limited removal under section 1441(c) to claims that invoked federal question jurisdiction:

Whenever a separate and independent claim or cause of action *within the jurisdiction conferred by section 1331 of this title* is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, *may remand all matters in which State law predominates.*

28 U.S.C. § 1441(c) (emphasis added).

1 *Motor Vehicle Casualty* and "declin[ing] to adopt this minority view"). No court has ever cited it  
 2 favorably. Accordingly, AMCO and SAFECO could not have properly removed the entire dispute or the  
 3 Karamanos cross-complaint.<sup>9</sup>

## 4 **2. Whether the Court Should Nevertheless Sever the Karamanos Cross-Complaint**

5 However, AMCO and SAFECO argue that this case is sufficiently analogous to the "sham  
 6 defendant" doctrine to warrant considering the merits of their motion to sever. Alternatively, AMCO and  
 7 SAFECO urge this court to apply the "fraudulent misjoinder" doctrine recognized by the Eleventh Circuit in  
 8 *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996).<sup>10</sup> Courts apply the sham  
 9 defendant doctrine when a plaintiff brings a wholly un-meritorious cause of action against a resident  
 10 defendant in order to destroy diversity jurisdiction. "Joinder of a non-diverse defendant is deemed  
 11 fraudulent, and the defendant's presence in the lawsuit is ignored for purposes of determining diversity, '[i]f  
 12 the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according  
 13 to the settled rules of the state.'" *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001)  
 14 (quoting *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987)).

15 The fraudulent misjoinder doctrine is essentially an application of the sham defendant doctrine. In  
 16 *Tapscott*, plaintiffs joined two "classes" of defendants under Federal Rule 20—those involved with "the  
 17 sale of 'service contracts' on automobiles" ["the automobile class"] and those involved with "'service  
 18 contracts' in connection with the sale of retail products" ["the merchant class"]—in a single putative class  
 19 action in state court. *Tapscott*, 77 F.3d at 1355. One defendant filed a notice of removal on the basis of  
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21  
 22 <sup>9</sup> SAFECO argues that, under 28 U.S.C. § 1447(c), a motion to remand must be made  
 23 within 30 days of the removal notice if its asserts a procedural, as opposed to a jurisdictional, defect.  
 24 Because it is undisputed that more than 30 days passed between the motion to remand and the removal  
 25 notice, SAFECO claims that plaintiffs and Zurich and Maryland waived their right to contest removal on the  
 grounds that AMCO and SAFECO are not "defendants" under section 1441. However, SAFECO cites  
 no case that holds that remanding without the authority to do so is a procedural defect. In any event,  
 because the court ultimately holds that it lacks diversity jurisdiction, SAFECO's claim does not affect the  
 outcome here.

26 <sup>10</sup> Courts sometimes refer to the "sham defendant" situation as "fraudulent joinder." *See, e.g.,*  
 27 *Emrich v. Touche Rosse & Co.*, 846 F.2d 1190, 1193 n.1 (9th Cir. 1988). Due to the similarity of the  
 28 terms "fraudulent joinder" and "fraudulent misjoinder," the court will use the phrase "sham defendant" to  
 describe the former scenario.



1 diversity. *Id.* The district court granted the motion, holding that "there was an 'improper and fraudulent  
 2 joinder, bordering on a sham.'" *Id.* at 1360. The Eleventh Circuit affirmed, reasoning that plaintiffs made  
 3 no attempt to justify the propriety of the joinder, thus elucidating that their conduct was fraudulent:

4 Misjoinder may be just as fraudulent as the joinder of a resident defendant against whom  
 5 a plaintiff has no possibility of a cause of action. A defendant's 'right of removal cannot be  
 6 defeated by a fraudulent joinder of a resident defendant having no real connection with the  
 7 controversy.' Although certain putative class representatives may have colorable claims  
 8 against resident defendants in the putative 'automobile' class, these resident defendants  
 9 have no real connection with the controversy involving . . . the putative 'merchant' class  
 10 action. We hold that the district court did not err in finding an attempt to defeat diversity  
 11 jurisdiction by fraudulent joinder. We do not hold that mere misjoinder is fraudulent  
 12 joinder, but we do agree with the district court that [plaintiffs'] attempt to join these parties  
 13 is so egregious as to constitute fraudulent joinder.

14 *Id.* (citations omitted). The Fifth Circuit has also adopted the fraudulent misjoinder doctrine, albeit in a  
 15 cursory one-paragraph opinion. *See In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (5th Cir. 2002).

16 However, the one California case to address the issue, *Osborn v. Metropolitan Life Ins. Co.*, 341  
 17 F. Supp. 2d 1123 (E.D. Ca. 2004), refused to recognize the fraudulent misjoinder doctrine.<sup>11</sup> In *Osborn*,  
 18 two California residents sued a California insurance company ("First American"), and a non-California  
 19 insurance company ("Met Life") in California state court. After Met Life removed the action to federal  
 20 court, plaintiffs filed a motion to remand. Met Life opposed the motion, citing *Tapscott* for the proposition  
 21 that plaintiffs "fraudulently misjoined" the two insurance companies to destroy diversity jurisdiction.  
 22 Reasoning that "the last thing the federal courts need is more procedural complexity," the court held that  
 23 "the better rule [is to] require Met Life to resolve the claimed misjoinder in state court, and then, if that  
 24 court severed the case and diversity then existed, it could seek removal of the cause to federal court." *Id.*  
 25 at 1127. In a footnote, the court explained that this could be accomplished without prejudice to Met Life's  
 26 ability to seek removal later:

27 [T]he time limit for removal would not affect a defendant's ability to have the misjoinder  
 28 issue resolved in state court first. Removal is not possible until the misjoined party that  
 destroys removal jurisdiction is dropped from the action, the thirty-day time limit for

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25 <sup>11</sup> *See also Brazina v. Paul Revere Life Ins. Co.*, 271 F. Supp. 2d 1163, 1172 (N.D. Cal.  
 26 2003 (declining to rule on *Tapscott*'s applicability but noting that "no other circuit has adopted its  
 27 rationale").



removal (but not the overall one-year limit for diversity cases) would not begin to run until that had occurred and thus a requirement that misjoinder be addressed in the state court would not impair the ability of an individual to remove an action following the elimination of the improperly joined party.'

*Id.* at 1127 n.10 (quoting Wright, Miller & Cooper, *Jurisdiction* 3d § 3723 at 656).

AMCO and SAFECO argue that *Osborn* should not apply to this case because it "is based on the faulty premise that the thirty-day period for removal will not begin to run until all issues concerning misjoinder are resolved in state court." AMCO Rep. Mot. Sev. at 4:3-4 (emphasis omitted). AMCO and SAFECO posit that, contrary to *Osborn*, if they had challenged the validity of the Karamanos cross-complaint in state court, the thirty-day limit would have lapsed. The court disagrees. The removal statute carves out an exception for cases where the possibility of removal arises later in the lawsuit:

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of [diversity] jurisdiction . . . more than 1 year after commencement of the action.

28 U.S.C.A. § 1446(b) ("section 1446(b)"). Here, "the case stated by the initial pleading"—whether construed as the entire dispute or the Karamanos cross-complaint—was "not removable." Indeed, the point of AMCO and SAFECO's motion to sever is to *make* the Karamanos cross-complaint removable. Thus, if AMCO and SAFECO successfully challenge the propriety of the Karamanos cross-complaint in state court, they will receive an "order . . . from which it may first be ascertained that the case . . . has become removable." Only then would the thirty-day clock begin to run on their ability to remove the Karamanos cross-complaint.

In any event, even if this court were to adopt *Tapscott*, it would not apply the fraudulent misjoinder doctrine here.<sup>12</sup> The court reads *Tapscott* to apply in the rare circumstance where the egregiousness of plaintiffs' misjoinder is readily apparent. Indeed, the Eleventh Circuit made clear that fraudulent misjoinder requires more than "mere misjoinder," and applied the doctrine to a case where plaintiffs did not even

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<sup>12</sup> Of course, applying *Tapscott* here would not only necessitate recognizing the doctrine, but extending it. This case involves the issue of whether Karamanos properly brought *cross-complaints* against AMCO and SAFECO, not whether he purposefully *joined* additional defendants to destroy diversity jurisdiction.

1 attempt to justify their conglomeration of various unrelated defendants. *Tapscott*, 77 F.3d at 1360.  
 2 Conversely, Karamanos has at least a colorable claim that his cross-complaint against AMCO and  
 3 SAFECO was proper. California Code of Civil Procedure section 428.10<sup>13</sup> permits cross-complaints  
 4 against a wide range of individuals:

5 A party against whom a cause of action has been asserted in a complaint or cross-  
 6 complaint may file a cross-complaint setting forth either or both of the following:

7 . . .

8 (b) Any cause of action he has against a person alleged to be liable thereon, whether or not  
 9 such person is already a party to the action, if the cause of action (1) arises out of the same  
 10 transaction, occurrence, or series of transactions or occurrences as the cause brought  
 11 against him or (2) asserts a claim, right, or interest in the property or controversy which is  
 12 the subject of the cause brought against him.

13 Because Karamanos' cross-complaint against AMCO and SAFECO arguably "asserts a claim, right or  
 14 interest" in the Maryland and Zurich cross-complaint—the right to indemnity and subrogation—it is  
 15 nowhere near as blatantly merit-less as plaintiffs' joinder efforts in *Tapscott*.

16 AMCO and SAFECO vigorously contend otherwise. First, AMCO and SAFECO cite *Pena v.*  
 17 *McArthur*, 889 F. Supp. 403 (E.D. Cal. 1994) for the proposition that actions against insurance  
 18 companies for breach of contract or bad faith often bear only a tenuous connection to their underlying  
 19 claims. In that case, Pena was involved in a car accident with an uninsured motorist, McArthur. State  
 20 Farm insured Pena. Pena filed a complaint in state court against McArthur for negligence and State Farm  
 21 for bad faith handling of her insurance claim. Defendants removed the case and filed a motion to sever the  
 22 two causes of action under Federal Rule of Civil Procedure 21. The court granted the motion, reasoning  
 23 that the negligence claim and the bad faith claim only superficially involved the same "transaction,  
 24 occurrence, or series of transactions or occurrences":

25 [T]here were two occurrences or transactions—the automobile accident between plaintiff  
 26 and McArthur and the alleged breach of fiduciary duty by State Farm in handling plaintiff's  
 27 claim. These are two distinct torts (negligence and bad faith claim) committed by different  
 28 defendants at different times, and they resulted in the invasion of separate legal interests .  
 . . . Here, plaintiff argues that proof of the bad faith claim will require analysis of the  
 underlying negligence claim. However, 'analysis' of the underlying claim in the bad faith  
 action is not identical to the underlying negligence claim itself.

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<sup>13</sup> The court agrees with *Osborn* that state procedural law should apply, as the question is  
 whether AMCO and SAFECO were properly joined in the first place. See *Osborn*, 341 F. Supp. at 1128  
 ("most courts looking at this issue have applied the state rule").

1 *Id.* at 405-06.

2       However, *Pena* considered the propriety of joinder under Federal Rule of Civil Procedure 20,  
 3 which is significantly narrower than its state-law counterparts. *Compare* Fed. R. Civ. P. 20(a) ("[a]ll  
 4 persons . . . may be joined in one action as defendants if there is asserted against them . . . any right to relief  
 5 in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and  
 6 if any question of law or fact common to all defendants will arise in the action) *with* Cal. Code Civ. P. §  
 7 428.10 (permitting cross-complaints that either "aris[e] out of the same transaction, occurrence, or series of  
 8 transactions or occurrences" or involve "a claim, right, or interest in . . . property" in the underlying claims);  
 9 *and* Cal. Code Civ. P. § 379 (permitting joinder of defendants "if there is asserted against them: (1) [a]ny  
 10 right to relief jointly, severally or in the alternative, in respect of or arising out of the same transaction,  
 11 occurrence, or series of transactions or occurrences . . . or (2) [a] claim, right, or interest adverse to them  
 12 in the property or controversy which is the subject of the action"). State law recognizes both the potential  
 13 for cross-claims and joinder in situations where federal law does not: where "a claim, right, or interest" links  
 14 the new party with the existing lawsuit. *Pena* is thus inapposite.

15       Next, AMCO and SAFECO argue that the Karamanos cross-complaint was improper because it  
 16 has no relationship with either the with the bad faith case or the Zurich and Maryland cross-complaint.  
 17 AMCO and SAFECO contend that they only insure MSI and Karamanos in his capacity as an officer and  
 18 director of MSI. AMCO and SAFECO also claim that neither the bad faith case nor the Zurich and  
 19 Maryland cross-complaint involve MSI or Karamanos in his official capacity. Instead, they assert, the bad  
 20 faith case and the Zurich and Maryland cross-complaint involve HVAC, AMT, and Karamanos as an  
 21 officer and director of those companies. Thus, according to AMCO and SAFECO, "the two disputes  
 22 involve distinct torts, committed by different defendants at different times, allegedly resulting in the invasion  
 23 of separate legal interests." AMCO Mot. Sev. at 14:15-18.

24       This argument is unconvincing. For one, AMT apparently ceased its business operations and sold  
 25 its assets to MSI in June 2000. Negrych Decl. Supp. Rep. Mot. Rem. ¶¶ 2-5. At that time, Karamanos  
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1 served as MSI's president. Karamanos Decl. Supp. Rep. Mot. Rem. ¶¶ 1-5.<sup>14</sup> The NSW cross-  
 2 complaint alleges that Karamanos engaged in wrongdoing "in 2001," when he ostensibly was acting as  
 3 MSI's president. Borovsky Decl. Ex. B, at ¶ 8. SAFECO's policy with MSI ended on September 1,  
 4 2001, while AMCO's policy ended on February 20, 2002. Goettsch Decl. Ex. A. Thus, because  
 5 Karamanos may have been insured by AMCO and SAFECO when he allegedly broke the law, he has a  
 6 non-frivolous claim that the Zurich and Maryland cross-complaint triggers his policy with AMCO and  
 7 SAFECO. Borovsky Decl. Ex. G at ¶¶ 86, 87, 90, 91. Moreover, even if AMCO and SAFECO are  
 8 correct that they were brought into the lawsuit incorrectly, that alone is not sufficient under *Tapscott* to  
 9 invest this court with jurisdiction where otherwise it would have none.<sup>15</sup>

### 10 C. Motion for Attorney's Fees

11 Plaintiffs move for an award of attorney's fees in connection with the improper removal. Under 28  
 12 U.S.C. § 1447(c), district courts may "require payment of just costs and any actual expenses, including  
 13 attorney fees, incurred as a result of the removal." The court declines to do so. Although this court  
 14 concludes that removal was improper, AMCO and SAFECO asserted tenable legal positions. *See*  
 15 *Schmidt*, 780 F.Supp. at 704 (rejecting a fee request because "[t]he minority position regarding third-party  
 16 removal is a plausible legal and factual basis for asserting removal jurisdiction"). Most courts that have  
 17 awarded fees have done so when a defendant should have been aware that removal was improper. *See*  
 18 *Ciolino*, 2003 WL 21556959 at \*8-\*9 (awarding fees when defendant did not file timely notice of removal  
 19 or proof of service). That is not the case here.

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24 <sup>14</sup> AMCO and SAFECO challenge the admissibility of Dean C. Burnich's declaration in  
 25 support of Zurich and Maryland's motion, apparently under the mistaken belief that striking it will cast doubt  
 26 on the relationship between MSI, Karamanos, and AMT. However, Karamanos and his counsel also  
 submitted declarations providing these facts.

27 <sup>15</sup> AMCO and SAFECO also argue that this court enjoys broad discretion to sever the  
 28 Karamanos cross-complaint. However, they cite no authority for the proposition that a federal court may  
 bootstrap the exercise of its own jurisdiction from a *nunc pro tunc* severance order.

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**III. ORDER**

For the foregoing reasons, the court grants and denies the motions as follows:

1. The court denies AMCO and SAFECO's motions to sever the Karamanos cross-complaint without prejudice to their ability to renew the motion in state court.
2. The court grants plaintiffs' and Zurich and Maryland's motion to remand the entire dispute.
3. The court denies plaintiffs' motion for attorney's fees.

DATED: 7/25/05 /s/ Ronald M. Whyte  
RONALD M. WHYTE  
United States District Judge

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10 Counsel are responsible for distributing copies of this document to co-counsel that have not registered for  
11 e-filing under the court's CM/ECF program.

12 **Dated:**                      7/25/05

DOH  
13 **Chambers of Judge Whyte**